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JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 102.

THE LAWRENCE MANUFACTURING COMPANY,
Appellant,
vs.
THE JANESVILLE COTTON MILLS.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

BRIEF AND ARGUMENT FOR APPELLANT.

J. H. RAYMOND,
Solicitor and of Counsel for Appellant.

TEMPLE COURT, CHICAGO,
Nov., 1890.

P. F. PETTIBONE & CO., PRINTERS, CHICAGO.

United States Supreme Court,

OCTOBER TERM, 1890. No. 102.

LAWRENCE MANUFACTURING COMPANY, *Appellant*,
vs.
THE JANESVILLE COTTON MILLS.
In Chancery.

BRIEF AND ARGUMENT FOR APPELLANT.

May it Please the Court:

We respectfully refer to the stipulation on page 76 of this record, and to the record and brief in the case of this Appellant *vs.* the Tennessee Manufacturing Company, now here pending, as number 101 of this term, as to the trade mark here involved.

STATEMENT.

The appellant, the Lawrence Manufacturing Company, a Massachusetts corporation, filed its bill in chancery against the Janesville Cotton Mills, a Wisconsin corporation, praying for an injunction against the use, by appellee, of the trade mark "L L" upon sheetings, claiming that such use was an infringement of complainant's trade mark for four-yard sheetings.

THE BILL alleges that in the early part of the year 1886 appellant had filed in the Circuit Court of the United States for the Western District of Wisconsin, a bill in chancery against the Janesville Cotton Manufacturing Company, which bill alleged that said last mentioned company had infringed appellant's rights by the use of the letters "L L" upon sheetings; that said use of said letters tended to deceive the public and constituted in law a fraud upon the public and upon appellant, and was for the purpose and with the intent and effect of appropriating a part, at least, of the good will and trade reputation of appellant, and of introducing into the public favor the sheetings of said Janesville Cotton Manufacturing Company to appellant's damage; that the Janesville Cotton Manufacturing Company confessed said bill of complaint, and a stipulation was made and entered into between appellant and said Cotton Manufacturing Company, bearing date March 30, 1886, which stipulation was as follows:

"It is hereby stipulated and agreed between the parties "to the above entitled suit,

"That the said Lawrence Manufacturing Company "hereby consents that the suit commenced in the Circuit "Court of the United States for the Western District of "Wisconsin against said Janesville Cotton Manufacturing "Company, be dismissed with costs to said Janesville Cot-"ton Manufacturing Company, and also hereby waives all "claims to damages against the said Janesville Cotton "Manufacturing Company; and the said Janesville Cot-"ton Manufacturing Company hereby agrees not to use "the label or trade mark "L L" on any goods of its "manufacture after the first day of July, A. D. 1886; and "it is further stipulated that a consent decree discontinu-

" ing said suit, without the right of appeal, shall be " entered in accordance with the terms hereof."

RAYMOND & RAINEY,
Solicitors for Complainant.

GEORGE C. SUTHERLAND,
Solicitor for Defendant.

The bill in the present case further alleged that, together with such stipulation, the appellant executed and delivered to said Janesville Manufacturing Company a release in accordance with the terms and stipulation above set forth ; and also that an agreement was also at the same time drawn up, and also submitted to said Janesville Cotton Manufacturing Company, binding it and its successors in said corporation *and in business*, and its assigns, not to use said trade mark upon any sheetings after July 1, 1886 ; that the stipulation, release and agreement were all adopted by the Board of Directors of the Janesville Cotton Manufacturing Company on April 3, 1886, and that appellant's solicitors were so notified by the solicitor (also a director) of said company.

The present bill then alleged that pursuant to the action of said Board of Directors, the said general agreement, and the said stipulation and contract, a consent decree was entered in said former cause as follows :

"This cause coming on to be heard, Messrs. Raymond " & Rainey appearing for the complainant, and Mr. George " G. Sutherland appearing for the defendant, and con- " fessing the said bill of complaint and consenting to this " final finding and decree, the Court doth order, adjudge " and decree as follows, the same being in accordance with " the stipulation of the parties heretofore herein filed, " to wit :

"First. That the total cost heretofore and now incurred "herein shall be paid by the complainant.

"Second. That a perpetual injunction issuing out of "and under the seal of this Court against the said defend- "ant The Janesville Cotton Manufacturing Company, "demanding it and each and every of its officers, agents, "servants and employees that from and after the first day "of July, A. D. 1886, they and each of them shall desist "and refrain from, directly or indirectly, using said letters "'L L' upon any sheetings of their manufacture, as in "said bill of complaint is mentioned.

"We hereby assent to the foregoing form of decree, "the same being in accordance with the terms of a stipu- "lation of the parties hereto, heretofore filed herein."

(Signed) "RAYMOND & RAINEY,
"*For Complainant.*

(Signed) "GEORGE G. SUTHERLAND,
"*For Defendant.*"

The present bill further alleged that the defendant in this case, the Janesville Cotton Mills being the successor in law and in business of the Janesville Cotton Manufacturing Company, had issued a certain circular letter, a copy of which was made an exhibit to the bill. (Rec. p. 8). This letter stated that appellee proposed to make three grades of sheeting "known to the trade as Badger State "R R R, and L L," under a distinct trade mark and stamp of their own, consisting of a diagonal bar across the letters R and L with or without the word "Double" in said bar.

The bill also alleged that immediately upon being informed of the issuance of said circular letter appellant demanded that appellee should withdraw the circular letter and cease preparations to use said capital letter L with the

word double written across it, and should not use the same, but that appellee had declined to comply with appellant's demand, and still threatened and proposed to use said capital letter L as its stamp on and after July 1, 1886.

The present bill sets up that such use by appellee would be a fraud on the public and a fraud on appellant, and "a viola- "tion of the said stipulation and of the said contract and of "the said consent decree, and a violation of the injunction "ordered in said prior suit as aforesaid," and prayed for an injunction and general relief.

THE ANSWER to this bill (p. 18) admitted that the Janesville Cotton Mills was organized as a corporation in April, 1886, but denied that it was in law or in fact the successor of the Janesville Cotton Manufacturing Company in any other sense than that it purchased the cotton mills and property of said last mentioned company; that some of the stockholders and officers of the Janesville Cotton Mills are the same as those of the Janesville Cotton Manufacturing Company. The answer further admitted that in the month of February, 1886, appellant filed the former bill substantially as set forth in the present bill of complaint. The answer further admitted that the Janesville Cotton Manufacturing Company did not defend in the former action, but entered into the stipulation set forth in the bill, and that the decree set forth in the bill was also entered. The answer further alleged that at the time the stipulation was signed and the decree entered, the Janesville Cotton Manufacturing Company was about to abandon the manufacture of cotton cloths, and go into liquidation and wind up its affairs, and that it would have no further occasion to use the letters L L after July 1, 1886; and "that

"it has since disposed of all its property rights and "privileges to the defendant, and has abandoned the busi- "ness of manufacturing cotton sheetings, has wound up "its affairs and been dissolved; that the defendant is a "wholly distinct and separate corporation from the said "Janesville Cotton Manufacturing Company; was not a "party to the said suit; is not bound by the said stipula- "tion or decree, nor by any other stipulation, agreement "or obligation entered into or assumed by the said Janes- "ville Cotton Manufacturing Company."

The answer admits the execution of the stipulation and the entry of the decree in the case of appellant against the Janesville Cotton Manufacturing Company, and the evidence is conclusive to show that the agreement referred to in the bill was binding on that company through the action of its Board of Directors.

Mr. J. H. Raymond, referring to the former suit against the Janesville Cotton Manufacturing Company, testified fully in regard to the settlement then made between the parties. He said: (Rec. 51 to 53).

"I was in that suit both as the attorney at law and the "attorney in fact of the complainant. I commenced same "under its directions, and had full power to act for the "complainant in its prosecution and in the settlement "of this subject matter. The negotiations for its settle- "ment from first to last were conducted by me with the "advice and assistance of my partner, Mr. Rainey. After "correspondence and consultation, in which it was fre- "quently represented on the part of the complainant that "the purpose of the action was to protect its trade-mark "property rather than to recover damages, and on the "part of defendant that it was willing in good faith to dis-

" continue the use of complainant's trade mark, an agree-
" ment was made and entered into by Mr. George G.
" Sutherland, representing the defendant and myself as
" representing the complainant, under which the suit was
" to be discontinued, without costs, and all damages
" accrued prior thereto were to be released. This agree-
" ment was effected verbally in my office, and subject only
" to two matters ; first, the ratification by the Board of
" Directors of the defendant company ; and second,
" whether the complainant should furnish a formal release
" of the damages independent of the papers to be filed in
" Court ; it was my voluntary offer and suggestion that the
" defendant should have a reasonable time in which to get
" rid of the stock on hand bearing the infringing marks.
" The form which this agreement should take was fully
" discussed and agreed upon by Mr. Sutherland and myself
" at the time, and papers were dictated, I think in his
" presence, embodying the same, which papers were taken
" by him from my office the same day, they having been
" written out and handed him by our chief clerk, Mr.
" Mason, with a letter stating that a formal and separate
" release to the defendant would be furnished if desired.
" Subsequently I was informed by Mr. Sutherland that the
" settlement so agreed upon between us had been ratified
" and adopted by the Board of Directors of the defendant
" company, and that the formal release referred to was
" desired. I refer here especially to Mr. Sutherland's let-
" ter, dated April 3, 1886, to us, heretofore introduced in
" evidence. That letter was received and answered by me
" April 5, 1886. The action of the said Board of Direc-
" tors was accepted, the formal release was promised, and
" all of the papers, including the stipulation, the decree
" and the formal release referred to, were in due course
" and promptly executed, delivered and filed, pursuant to
" the agreement (partially verbal and partially in writing),
" thus arrived at between the defendant company and me.
" The last thing, to end this agreement in all its details,

" should have been the forwarding to me of the agreement " of the defendant company to desist from the further use " of complainant's trade mark, which from the time the " additional agreement made between Mr. Sutherland and " me at the time of the ratification and practical consum- " mation of the agreement between the directors and " myself, formed a necessary and principal part thereof. " I refer to the draft of an agreement so agreed to and " handed to Mr. Sutherland, and so accepted by the " Board of Directors of the defendant, a type-written copy " of which has been introduced in evidence, dated March " 30, 1886.

" The first agreement that the suit was to be dismissed " without cost and without back damages was in the rough " and substantially arrived at by the correspondence prior " to the date of my interview with Mr. Sutherland March " 30, 1886, who then brought me a draft of a stipulation " which I had submitted by mail and to which he objected. " Between the commencement of the correspondence and " this date I had learned that the defendant company was " not paying its debts nor living up to its contracts, and that " its longer existence was at least questionable. At the in- " terview with Mr. Sutherland, to which I have referred, I " so stated to him, and stated to him that it was a necessary " part of the agreement as far as the plaintiff was concerned " that the agreement should be binding not only upon the " successors in the corporation or the then stockholders and " officers, but also upon the successor of said corporation in " business, and in the conversation with him at that time, " explicitly explained to him why I insisted upon the words " 'successor in business' in said agreement. It was then " distinctly understood between Mr. Sutherland and myself " at that time, and subject only to the two conditions which " I have named, that this agreement should be made and " should be binding upon whoever might succeed the " Janesville Cotton Manufacturing Company in the man- " ufacture and sale of brown cottons. With this explana-

"tion, my answer to the question is that the agreement "dated March 30, 1886, binding the said company and "its successor in business was, barring the formal stipula- "tions, the only agreement ever fully made between the "parties to that suit. It was consummated, subject only to "the conditions I have named, on March 30, 1886, and the "conditions were arranged and the contract fully com- "pleted on April 3, 1886."

Mr. Mason, Mr. Raymond's clerk, testified (Rec. 28) that on March 30, 1886, Mr. Sutherland, (the attorney of the J. C. M. Co.) brought a stipulation to Raymond & Rainey's office, Chicago, which was not exactly satisfactory to Mr. Raymond, and which was given to Mason to re-write, with alterations; that at the same time Mr. Raymond dictated to witness an agreement which he wished Mr. Sutherland's company to execute and return to him; at the same time also Mr. Raymond dictated a letter to Mr. Sutherland; Mr. Sutherland went out of the office and came back after a while, and the letter and three copies of the stipulation and three copies of the agreement were handed him. All these papers were dated March 30, 1886.

This is the agreement set out in "Mason Exhibit E" to the bill of complaint (Rec. 16), and it is quoted fully in our argument *infra*.

In the letter of Mr. Raymond to Mr. Sutherland, the former said (Rec. 16): "I hand you herewith three copies "of the stipulation signed by us for the discontinuance of "the suit of *The Lawrence Manufacturing Company* v. "*The Janesville Cotton Manufacturing Company*, to- "gether with three copies of an agreement to be executed "under the authority of the Board of Directors by the

"President and Secretary, and under the seal of the latter "company."

Mr. Raymond also stated in the same letter that if the Janesville Cotton Manufacturing Company desired, he would procure and send on a formal release by the Lawrence Company of all claims for damages, adding, "but "the agreement of the Janesville Company made in con- "sideration of that release, and the whole matter being a "matter of record in court, would not necessitate such a "formal release from the Lawrence Company. It will, "however, be furnished if desired."

To this letter Mr. Sutherland replied by letter of April 3, 1886 (Rec. 16), stating that he was unable to get a meeting of the Directors of the Janesville Cotton Manufacturing Company until "this afternoon," and saying "*they* "*have just authorized me to sign the stipulations as drawn,* "*and they further authorized the President and Secretary* "*to sign the agreement drawn by you on receiving the re-* "*lease mentioned in your letter from the Lawrence Manu-* "*facturing Company. I have sent the original stipulation* "*to the Clerk of the Court at Madison, and enclose you a* "*duplicate.*"

Mr. Mason also stated (Rec. 49) that Mr. Sutherland did return one of the copies of the stipulation, but did not return any of the copies of the agreement. He also stated (Rec. 50) that no other stipulation or agreement was sent from the firm of Raymond & Rainey, either by letter or handed to Mr. Sutherland, than those he had referred to.

It appears also by Mr. Mason's testimony, as well as by Mr. Raymond's, that the release of the Lawrence Manufacturing Company was duly executed by that company,

and duly delivered by mail to the Janesville Cotton Manufacturing Company. (Rec. 15).

Mr. Sutherland, the attorney, and a director of the Janesville Cotton Manufacturing Company, and vice-president of the Janesville Cotton Mills, also testified (Rec. 44) that he received from the Lawrence Manufacturing Company, through Raymond & Rainey, its solicitors, a release of the old company from damages mentioned in the proceedings of the Board of Directors, and in his letter of April 3, 1886. Mr. Sutherland also stated that he thought a paper handed to him by appellant's solicitor was a copy of that release.

The record books of the Board of Directors of the Janesville Cotton Manufacturing Company show that at a special meeting of the Board of Directors of said company, held April 3, 1886, in the afternoon, "on "motion of Mr. Eldred, Mr. Sutherland was authorized "and instructed as our attorney to sign the stipulations "agreed upon by the attorneys of the Lawrence Manufac- "turing Company and Mr. Sutherland in behalf of the "Janesville Cotton Manufacturing Company; and,

"On motion, Mr. Sutherland was instructed to notify "the attorneys of the Lawrence Manufacturing Company "that the President and Secretary of the Janesville Cotton "Manufacturing Company will execute, under the author- "ity of its Board of Directors, the agreement to discon- "tinue the use of said L L stamp whenever the Lawrence "Manufacturing Company shall sign a formal release, duly "executed, of all claims for damages against the Janesville "Cotton Manufacturing Company for the use of said L L "stamp."

Mr. Mason (Pr. Rec. 15), explained the failure to ask the J. C. M'f'g. Co., or Mr. Sutherland, for the formally executed agreement. He said that the stipulations and decree were duly executed and filed, and that thereupon, believing the matter to be fully settled in good faith, and the parties all sufficiently and fully protected, he neglected to ask for the formal evidence, duly executed under the seal of the Janesville Cotton Manufacturing Company, of the agreement, until by letter he was informed of the dissolution of the Cotton Manufacturing Company.

The evidence bearing on some of the points above, and on the question of infringement, will be more fully referred to in the argument *infra*.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in dismissing appellant's bill of complaint.

3. The Circuit Court erred in refusing to enter a decree perpetually enjoining appellee, as prayed in appellant's bill of complaint.

3. The Circuit Court erred in not entering a decree in favor of appellant.

ARGUMENT.

If the court please, we contend:

1. That appellee is bound by the stipulation, argument and decree entered in the case of Appellent vs. the Janesville Cotton Manufacturing Co., for the reason that appellee is a successor and assign of the Janesville Cotton Manufacturing Co., within the meaning of the agreement of March 30, 1886 (Rec. 16), and had notice of that agreement when it bought the business, plant, and all the property of that company, and because the successor to the Manufacturing Company in all respects with no other real change than a mere change of name.

2. We contend, also, that a fraud would be perpetrated upon appellant if the decree in the former suit does not bind appellee.

I.

Appellee is a successor and assign of the Janesville Cotton Manufacturing Co., within the meaning of the agreement of March 30, 1886, and had notice of that agreement when it purchased the plant and property, and is therefore bound by the agreement.

The agreement in question, which formed part of the settlement, provided as follows:

Lawrence M'f'g Co. vs. *Janesville Cotton Mills.*

"For and in consideration of the discontinuance by The "Lawrence Manufacturing Company of Lowell, Massa- "chusetts, of a suit now pending in the United States "Circuit Court for the Western District of Wisconsin "against the Janesville Cotton Manufacturing Company, "and in consideration of a release of all claims for damages

" for the infringement of the trade mark of said Lawrence " Manufacturing Company for brown sheetings in the use " of the letters 'L L,' all in accordance with the stipula- " tion in said cause now made and executed, the said " Janesville Cotton Manufacturing Company does hereby, " for itself, its successors, *both in said corporation and in* " *said business, and for its assigns*, covenant and agree to " and with the said Lawrence Manufacturing Company, " its successors and assigns aforesaid, not to use the label " or trade mark 'L L' on any goods of its manufacture " after the first day of July, A. D. 1886."

We have already seen in the Statement, *supra*, that the evidence conclusively shows that this agreement was assented to by the Janesville Cotton Manufacturing Company, and that its execution in proper form was ordered by its Board of Directors on receipt of a release of damages from appellant. We also see that such release was, in fact, executed by appellant, delivered to, and accepted by the Janesville Cotton Manufacturing Company.

There seems to us no need of discussion to show that under such facts, the terms of the agreement became binding on the Janesville Cotton Manufacturing Company.

By this agreement, *supra*, the Janesville Cotton Manufacturing Company covenanted and agreed with appellant, " for itself, its successors, both in said corporation, *and in* " *said business*, and for its *assigns*," not to use the label " L L" after July 1, 1886.

Can there be any doubt whatever that a corporation which buys the manufacturing plant of another company, together with all the rest of its property, and carries on the same business, is its "successor in said business"? Is not the vendee company, also, in such case, an "assign" of the vendor corporation?

Whether appellee is a different company from the Janesville Cotton Manufacturing Company or substantially the same company, ought not to be material to be discussed in this connection. Even if conceded to be substantially a different company, appellee is none the less the "succes-"sor in business," and the "assign" of the Janesville Cotton Manufacturing Company.

It is difficult for us to understand who could be regarded as a "successor in business" of the Janesville Cotton Manufacturing Company, if it were held that appellee were not such a successor.

It appears from the evidence that the officers of the old company were W. A. Lawrence, President; E. C. Smith, Vice-President; and F. S. Eldred, Treasurer; that these officers, together with the following named persons, constituted the Board of Directors of the old company, viz.: William McClune, J. N. Williamson, W. C. Heller, George G. Sutherland, E. W. Fisher, James Sherer and Henry Palmer. The officers of the present company, appellee, were Henry Palmer, President; George G. Sutherland, Vice-President; F. S. Eldred, Treasurer; and A. J. Ray, Secretary; these officers and the following persons formed the Board of Directors of appellee, viz.: E. C. Smith, James Sherer, E. W. Fisher, William McClune, F. Kimball, and R. Richardson. The Secretary and Treasurer, respectively, of both companies were the same, viz.: A. J. Ray and F. S. Eldred.

Ray, the Secretary of both Boards, stated (Rec. 25–26), that the "Janesville Cotton Mills was organized, and suc-"ceeded by conveyance duly executed by the Janesville "Manufacturing Company, to all the rights, privileges and "immunities of the said last mentioned company."

The circular letter sent out by appellee (Rec. 88) stated, as to the Janesville Cotton Manufacturing Company, that it "has been dissolved by mutual consent of the stock-"holders, and all of its property, consisting of two thor-"oughly equipped cotton mills, together with its franchises "and good will, had been sold and transferred to the "Janesville Cotton Mills, a new corporation, organized "for the purpose of continuing the manufacture and sale "of the justly-celebrated 'Badger State Sheeting.'"

Ray also stated, in his answer to the 33d interrogatory (Rec. 26), that "the defendant insists that it has the right "to use the letters L L simply, on cotton sheetings it "manufactures, as the assigns and successors of said "Janesville Manufacturing Company, under the stipula-"tion on which said decree mentioned in said complaint "was entered, until the first day of July next."

In his answer to the 34th interrogatory (Rec. 26), Ray said that it was correct that "by the stipulation made be-"tween the attorneys of the said Lawrence Manufacturing "Company and the Janesville Manufacturing Company, "the right on the part of the latter company to use the "letters L L on the sheetings manufactured by it and its "assigns was expressly reserved until the first day of July, "1886, and, as the assigns and successors of the said "company, the defendant has the right to use the same."

The quotations above made from Ray's deposition were a reiteration by him of his statements made in his affidavit filed in the present case on the motion for a preliminary injunction; *as it appears that in order to defeat that motion appellee took the position that it had the right to use the letters L L, under and by virtue of the stipulation made in*

the former suit, on the express ground that it was a successor and assign of the Janesville Cotton Manufacturing Company.

Moreover, in his answers to interrogatories 35 and 36, (Rec. 26) Ray stated that it was true that appellee succeeded to and became possessed of the property of the old company, including the mills, machinery and properties of all kinds; and in his answer to question 56 (Pr. Rec. 29), he stated that appellee considered itself entitled to use L L on its four-yard sheetings, as the successor of the old company up to July 1, 1886. Also, in reply to interrogatory 93, Ray said: (Pr. Rec. 32) "I think there can be no "doubt that the present company is, to all intents and purposes, the successor of the old company."

The record also shows (Rec. 46–47) the proceedings of the Board of Directors of the old company, preparatory to its dissolution; it is impossible to read the resolutions adopted by the Board without coming to the conclusion that the new company was formed merely to continue the old company's business, as its successor. The stockholders of the old company were given the right for ten days to subscribe to the stock of the new company. The new stock, consisting of about 3,000 shares, was in fact subscribed for by substantially the same old stockholders in the Janesville Cotton Manufacturing Company, (Pr. Rec. 27). The new company took the whole property and assumed the unsecured liabilities of the old company. Article 7 of the Articles of Association of the new company provided: (Pr. Rec. 81).

"Article 7. It is contemplated that such corporation "shall acquire the title to and become the absolute owner

"of all and singular the real and personal property of the "Janesville Cotton Manufacturing Company, subject to all "existing liens thereon, and the said Janesville Cotton "Mills is, in such case, to assume and pay all indebted- "ness of said Janesville Cotton Manufacturing Company, "due *or to become due*, upon its promissory notes *or other* "*written contracts* which are not secured by lien upon its "property, but is not to assume any indebtedness or "liability secured by lien upon such property or evidenced "otherwise than as above stated.

"Subscriptions to the capital stock of said Janesville "Cotton Mills may be paid in by or with notes or bonds "executed by said Janesville Cotton Manufacturing Com- "pany, due or to become due, if the payment thereof is "either assumed by or secured by lien upon the property "of said Janesville Cotton Mills."

See, also, Pr. Rec. 46–47 for the deed from the old company to appellee, which provides:

"The party of the first part, for and in consideration of "the sum of one dollar, to be paid by said party of the "second part"—that is the Janesville Cotton Mills—"the "receipt whereof is hereby acknowledged, and for the fur- "ther consideration, that the said party of the second "part assumes and agrees to pay all the indebtedness of "the party of the first part, due or to become due, upon its "promissory notes or other written contracts which are "not secured by lien upon its property, has granted, bar- "gained, sold, aliened, remised, released, conveyed and "confirmed, etc., * * * all and singular the real "estate, water power, cotton mills, offices, store houses "and other buildings, fixtures, machinery, tools and appur- "tenances thereunto belonging or appertaining, to the said "party of the first part, situate and being in the City of "Janesville, County of Rock and State of Wisconsin."

It appears from the record that on the 10th day of March, 1886, certain resolutions were offered and passed

by the Board of Directors of the Janesville Cotton Manufacturing Company to be submitted to a stockholders meeting to be held on the 11th day of March, 1886, providing and reciting, among other things, as follows:

"*Resolved*, By the stockholders of the Janesville Cotton "Manufacturing Company that said company be dissolved "as a corporation, all of its property sold and its affairs "wound up.

"*And Whereas*, It is contemplated by the stockholders "of said company that some of them shall immediately "proceed to organize another corporation, and for the same "purposes of manufacturing and selling cotton cloths, "with the view and understanding that the amount of cap-"ital stock of such new corporation shall be fixed at $150,-"000 to be paid in cash or indebtedness of the company "by the subscribers therefor as such payment shall be "called for by its Board of Directors, and that each of the "present stockholders of the present Janesville Cotton "Manufacturing Company shall have the privilege, for ten "days, of subscribing for the capital stock of such new "company *pro rata* share and share alike, in proportion to "the amount of the stock of said Janesville Cotton Manu-"facturing Company owned by them respectively (Pr. "Rec. 46).

The record also shows that, while the stipulation for the settlement of the former case was dated March 30, 1886, and the meeting at which the agreement was approved was held on April 3, 1886, the preparations for the dissolution of the old company were made long before at the meeting of the Board on March 10 and 11, 1886. That is, this stipulation and agreement binding the old company's successors and assigns, was made while the old company was actively carrying out a plan for its dissolution and the organization of a new company, to take all its property

and carry on the same business. (See Pr. Rec. 46–47; 27; 33).

We may refer also to Mr. Raymond's testimony in this connection. No contradiction of it was attempted by Appellee. (*Vide* Pr. Rec. 52–3).

It also appears that the new company did not even procure a new set of books, but continued to use the books of the old company, (see Pr. Rec. 41; Interrogatory 194); and, also, that it continued to use the same brand on its sheetings as the old company, only changing from the "L L" to the single "L," with the word "Double" written across it. (Pr. Rec. 29; Interrogatory 69).

We submit, that under all this evidence, there can be no doubt that the Janesville Cotton Manufacturing Co., under this agreement, bound itself that appellee, in carrying on business as "successor in business" and "assign" of the former company should not use the "L L" mark on sheetings. This agreement, in regard to this business, was equally binding on appellee, who purchased with notice of it.

The facts conclusively show such notice.

H. Palmer, the President of appellee, and who, as was provided by its articles of association (Pr. Rec. 80), should "have and exercise general supervision and control over "all the business and affairs" of appellee, was a member of the Board of Directors of the Janesville Cotton Manufacturing Co., and was present at the meeting of April 3, 1886 (Pr. Rec. 27), at which the agreement was submitted to that Company, and then accepted by it, subject to the execution of the release by appellant. And at that same meeting were also present, Wm. A. Lawrence, E. C. Smith, F.

S. Eldred, George G. Sutherland, William Macloon, and A. J. Ray. All of these persons were directors of appellee, and moreover, Eldred, Sutherland and Ray were respectively, Treasurer, Vice-President and Secretary of appellee. (See The Distilled Spirits, 11 Wall. 356). Moreover, the chancery suit, and the decree therein against the Janesville Cotton Manufacturing Co., was a matter of record prior to appellee's purchase of the plant. (See *Safford* v. *People*, 85 Ill. 558 ; at p. 560 quoted *infra*.

II.

It would be a fraud upon appellant if the decree in the former suit did not bind appellee.

It is not necessary here to re-state the facts in this case. Those facts conclusively show : that appellee was organized for no other purpose than to take all the property and business of the Janesville Cotton Manufacturing Co., continue the same business, manufacture the same line of goods and stamp such goods with the same old labels ; that the old stockholders were to have the prior right to take the new stock, and that they all substantially availed themselves of that right ; that, after interviews and correspondence between the solicitors of appellant and of the old company, on which appellant relied in good faith and supposed the old company and its solicitor and directors were acting in good faith, the old company and appellant entered into the agreement and stipulation, for a valuable consideration, binding the old company and its successors in business and assigns to discontinue the use of the L L label. It further appears that during these negotiations with the old company, and prior to their completion by the action of its board of directors at the meeting of April 3, 1886, sub-

stantially the same officers were re-organizing the old company, and forming appellee, its successor and assign.

This court must see that, under such circumstances, to hold this agreement and decree in the former case not binding on appellee would be to enable appellee, and the persons who organized appellee as a corporation, to perpetrate a fraud of the grossest character on appellant. We submit that this court will look through the mere form that a transaction may take, and decide whether it is in reality a fraud or not, and that it will not allow appellant's right to be defeated by any such transparent device as was adopted in the present case.

Under the evidence in this record, already referred to, appellee is, in every substantial respect, merely the old company, masquerading as a separate entity, and endeavoring to perpetrate a fraud on appellant. We contend that, in the eye of a court of equity, appellee must be regarded as the old company, so far as this injunction order is concerned, and must be held bound by it.

But, further, the decree in the former suit provided that "a perpetual injunction issue out of and under the "seal of this court against the said defendant, The Janes-"ville Cotton Manufacturing Company, demanding it and "each and every, its officers, agents, servants and em-"ployes, that from and after the first day of July, A. D. "1886, they, and each of them, shall desist from directly "or indirectly using the said letters L L."

There can be no doubt that this injunction order is binding upon Henry Palmer, George G. Sutherland, F. S.

Eldred, and A. J. Ray, the officers of the present company; for at the time that decree was entered these persons were controlling officers of the Janesville Cotton Manufacturing Company. Nor can there be any doubt that this injunction order is binding upon all of the persons comprising the present Board of Directors of appellee, with the possible exception of Kimball and Richardson. It is manifest that appellee, being a corporation, an artificial entity, can only act through agents and employes. We submit, then, that the persons who organized this new company, and now form its Board of Directors and its officers, cannot evade this injunction order by creating a new corporation which in every substantial respect is identical with the old one.

We refer to the following analogous authorities:

In *Mayor* v. *Ferry Co.*, 64 N. Y. 622, after an injunction restraining the running of a ferry boat had been granted against a corporation, such corporation executed a bill of sale of the ferry boat to one Pendleton, individually. Pendleton was also the President of the corporation. After the execution of this bill of sale, Pendleton continued to run the boat. It was held that he was properly punished for contempt to the injunction order.

The Court stated that "injunction orders must be fully "and honestly obeyed, and not defeated by subterfuges "and tricks on the part of those bound to obey them; "that they might be violated by aiding, countenancing "and abetting others in violation thereof, as well as doing "it directly, and the Courts would not look with indul- "gence upon schemes, however skillfully devised, designed "to thwart its orders."

In *Safford* v. *The People*, 85 Ills. 558, a court of chancery enjoined a railroad company, its agents, employes and attorneys from loading and unloading cars on a certain street in Cairo. Subsequently the railroad was placed in the hands of a receiver by the United States Court. The receivers entered upon the discharge of their duty, and proceeded to unload and load cars on the street in question; thereupon proceedings were taken to punish them for contempt. The receivers set up as a defense that they were not the agents or servants of the railroad company, but having been appointed receivers by the Federal Court they were its agents, and not amenable to nor were they restrained by the injunction of the State Court, and that if they were, by force of the original writ of injunction, that writ was in effect annulled by a decree of the Federal Court authorizing them to perform the several acts which were charged as a violation of the injunction.

The Supreme Court of Illinois after considering the above, among other facts, says: "The Railroad Company "was under restraint by an order of a court of com- "petent jurisdiction at the time plaintiffs in error were "appointed receivers, and no question can be, with any "pretence of legal principle for its support, urged against "the binding force of the injunction. According to every "principle of the law, it was binding upon all persons to "whom it was directed, and in the very necessities of the "case its scope and operation must be broader than is "claimed by plaintiffs in error. The order and writ are "matters of public record of which all persons are bound "to take notice at their peril. If the Court were to enjoin "a person from doing a specified act in reference to a "piece of property of which he was the owner, and he

" were to sell it pending the injunction, can it be possible " that the authority of the law as spoken by its appro- " priate tribunals, could be defeated and successfully " resisted by the purchaser doing the very act the law had " prohibited his vendor from performing? Most assuredly " not. Suppose in this case the road, property and fran- " chises of the company had been sold, would that have " revoked and annulled the restraining order of the Court " and permitted the purchaser to have proceeded to the " performance of the prohibited act? Most unquestion- " ably not. The authority of the law cannot be so easily " evaded and thwarted. It surely has some vigor, and its " decrees must have some force. To hold otherwise would " be to render the Courts impotent, and their power only " affective so far as litigants might choose to acquiesce. In " the cases supposed, besides a large number of others that " might be cited, the purchaser would take the right pre- " cisely as it was held by the seller. If he were under " restraint as to its use, the vendee would be under the " same restraint."

In *Wimpy* v. *Phinizy*, it was held that where an injunction had been granted against the defendant, his servants, agents and employees, restraining them from interfering with the possession, use and enjoyment by the complainant of a certain house, an attorney who had represented the defendant on a hearing of the case, and who had notice of the injunction, was bound thereby; and that he could not, by virtue of subsequent employment by other parties claiming the house in their own right and not under the defendant, take possession of the same or put others out of it.

The Court said: "The employment subsequently by "the purchaser from Hayden (the defendant) and then "violating the injunction has the appearance of a subter- "fuge—a sort of trick to secure possession for the origi- "nal client in the name of secondary employes. Be that "as it may, no man enjoined from interference with "property by a Court of Chancery can be allowed by "shifting his position, his relation to the cause, even "innocently of trick or contrivance, to do what he knew "the Court had ordered him not to do.

In *Morton* v. *Superior Court*, 65 Cal. 496, an injunction was issued requiring a corporation, to remove a certain dam and enjoining the corporation, its officers, agents and employes from continuing or maintaining the same. The corporation caused the dam to be removed, but soon after its removal a person holding the office of President and Director of the Company resigned his positions and transferred all his certificates of stock therein, and then entered into an agreement with one Johnson to purchase from him a tract of land which included the locality from which the dam had been removed. Under this arrangement with Johnson the former President entered upon the land, rebuilt the dam and insisted upon his right to maintain it, because neither he nor Johnson, from whom he derived the right, was a party to the injunction suit. It was held that he was guilty of a contempt of the injunction order.

In the course of the opinion the Court said: "Besides "the effect of an injunction restraining any acts of a cor- "porate body, and addressed to it and its agents, is to bind "not only the intangible artificial being, but also all the "individuals who act for the corporation in the transac-

" tion of its business to whose knowledge the decree comes. " Unless this be so it would be necessary, in order effect- " ually to bind a corporation by an injunction, to make " every person a party to a suit who could by any possi- " bility be its agent in doing the prohibited act. (High on " Injunctions, Sec. 850). Undoubtedly an officer of a " corporation has a right to sever his connection with the " corporation, and to individually acquire property real or " personal from others, but he will not be permitted to " exercise his right for the mere purpose of treating with " contempt the orders and decrees of a court which he is " bound to respect."

The Court then quote with approval the case of *People* v. *Pendleton*, 64 N. Y. 624, referred to *supra*.

Evidence or argument to show that the use of the letter L, with the word double printed across it, is the merest kind of a puerile attempt at a colorable evasion of complainant's mark, seems to be quite unnecessary. The record is full of evidence that these goods were known in the trade as "Double L L's"; an example of which is the evidence of Boxrud, a retail merchant in defendant's territory (p. 133, q. 1315), who says that complainant's goods were known as "Double L L's," and sometimes as "Lawrence L L's." Defendant's witness, Bailey, who was Superintendent of the Janesville Mill, under the old company, for nine years and was with the present company for two years, says (p. 66, qs. 91 and 93), that both the goods of the old company and the goods of the new company were called "Double L."

If, pursuant to the evidence in the case of this Appellant *vs.* the Tennessee Company, stipulated into this case

(p. 76), it shall be found that in 1886, when appellant filed its bill of complaint against the Janesville Cotton Manufacturing Company, complainant was the owner of the exclusive right to use "L L" on brown cottons of this class, the conclusion will follow, as a matter of course, that the use of the mark adopted by the Janesville Cotton Mills should be enjoined.

But we also insist that the Janesville Cotton Mills, by virtue of the contract with and decree against the The Janesville Cotton Manufacturing Company, is estopped from the use of "L L," or any imitation thereof, and that a decree, accordingly, should go against it.

There can, I think, be no doubt that the appellant at Circuit had a choice of two remedies,—the one to proceed against The Janesville Cotton Mills, as for a contempt for violating the injunction awarded against it under its other name [The Janesville Cotton Manufacturing Company] or to proceed by an independent bill. (25 Fed. Rep. 447).

The second course was adopted in order that the present corporation, *eo nomine*, might be before and within the jurisdiction of the Court.

No opinion was filed in the court below. Before this case was reached for decision in the court below, his Honor, Judge Jackson, had filed his opinion in the Tennessee case, denying complainant's right to the trade mark sued upon. It is fair to suppose that upon the basis of that opinion his Honor, Judge Bunn, at Madison, considered that it would be inequitable to enjoin the defendant, notwithstanding the

contract and estoppel insisted upon, until the main question of the trade mark had been passed upon by this Court, and, therefore, without announcing reasons, dismissed the bill.

This case, therefore, comes here without adjudication, and we insist,

First. That complainant has full and complete rights to "L L" as a common law trade mark, and [defendant having submitted that question upon the evidence in the Tennessee case] upon that ground, a final decree for a perpetual injunction should be entered against defendant, and :

Second. That, in all equity, *under the contract and estoppel* referred to, this defendant should be made to keep its contract, and should be perpetually enjoined by a final decree from using L L on brown cottons of this class, and from using any imitation thereof.

Respectfully submitted,

J. H. RAYMOND,

Solicitor and of Counsel for Appellant.

TEMPLE COURT, CHICAGO,
NOV., 1890.

Office Supreme Court, U. S.
FILED,
NOV 28 1890
JAMES H. McKENNEY,
CLERK.

No. 102

Supreme Court of United States.

LAWRENCE MANUFACTURING COMPANY,

Complainant,

—*vs.*—

Janesville ~~BEAVER DAM~~ COTTON MILLS,

Defendant.

BRIEF OF RESPONDENT.

I. C. SLOAN,
Solicitor for Defendant.

I. C. SLOAN,
Of Counsel.

DEMOCRAT PRINTING CO., MADISON, WIS., PRINTERS AND STEREOTYPERS.

Supreme Court of United States.

LAWRENCE MANUFACTURING COMPANY,

Complainant,

vs.

Janesville ~~BEAVER DAM~~ COTTON MILLS,

Defendant.

BRIEF OF RESPONDENT.

FACT.

The complaintant has brought suit to restrain the defendant from using the letter "L" with the word "double" written across it on a certain grade of brown cotton sheetings weighing about four yards to the pound.

The Lawrence Manufacturing Company began using the letters "LL" in 1867 to indicate this grade of sheetings and has used it ever since, and now claims that the said letters constitute its trade mark and the defendant is violating the same by the use of the letter "L" with the word "double" written across it as stated above.

The defendant maintains:

1. That the letters "LL" as used on sheetings, simply indicate the weight, quality or grade of the goods, and not the ownership or origin, and are therefore not the subject of trademark.

2. That the complainant, by its long acquiescence in the use of "LL" by other companies, has lost its exclusive right thereto, if it ever had any such right.

3. That the Lawrence Manufacturing Company, by branding the same quality or grade of goods Shawmut LL and Albany LL, and putting them upon the market, has thereby lost its right to the exclusive use of the letters LL upon sheetings of its manufacture.

4. That the Lawrence Company never had the right to the exclusive use of the letters "LL" because the Atlantic company used the said letters upon substantially the same grade of sheetings as early as 1860.

5. That the stamp or brand used by the defendant, with the letter "L" with the word double written across it as a part of the same, is so different from complainant's stamp or brand that no one is deceived thereby.

These propositions are supported by the almost unanimous testimony of the witnesses who have been examined in this

cause; by those on the part of the complainant as well as those on the part of the defendant.

First. All of complainant's witnesses as far as we have examined agree that the "LL" as marked on complainant's goods indicate the grade or weight of the goods manufactured by it. Also that "LL" marked on cotton goods generally indicates that they are four yards goods.

Walter H. Smith:

Q. 296. Does or does not the symbol LL, when applied to sheetings manufactured by the complainant indicate four yards goods made by the complainant? Ans. It does.

Charles S. Smith:

Q. 399. To which general class does LL indicate a sheeting to belong? Ans. To four yards to the pound.

Edwin B. Wingate:

Q. 810. Is it not generally understood among jobbers and retailers who deal in brown sheetings that that LL means and designates sheetings running four yards to the pound? Ans. This is the general acceptation of the term as I understand it.

Charles B. Sanders:

Q. 975. Do not the letters LL printed on brown sheeting mean and are they not accepted generally in the trade with which you are familiar as meaning and designating four-yard goods? Ans. They are understood to mean goods or goods of that grade or quality.

Richard Hodd:

Q. 1041. Then LL alone is used and understood generally to mean a certain grade or quality of goods, does it not? Ans. It does; four yard goods.

James J. Brown:

Q. 1066. But they know that it (LL) indicates a certain grade or quality of brown sheeting, do they not? Ans. Yes, sir.

E. A. Houghton:

Q. 1078. The letters LL do indicate a certain grade or quality of brown sheeting, up to which grade or quality all of the LL's named by you are supposed to come, do they not? Ans. Yes, sir.

C. C. Cook:

Q. 1191. While LL may have as a part of its significance or meaning of representing brown sheetings of four yards to the pound, yet is it or not a fact that it means primarily more, *i. e.*, goods made by the Lawrence Manufacturing Co.? Ans. I couldn't say that it does.

E. W. Williams:

Ans. Well, our house would understand that LL goods meant 4 yard goods, but our trade know them only as LL's.

Q. 1218. If your trade and the trade generally, are ignorant as to the 4 yard weight, yet they do know that the letters LL are used to indicate a certain grade or standard sheeting as distinguished from other standard grades, do they not? Ans. Yes, sir, they do.

Alf. Brooks:

Q. 1269. That is, you have always understood that the Lawrence mills stamped LL upon certain goods to show of what particular grade it was? Ans. Yes, sir.

Anton H. Roxbury:

Q. 1325. With what have you associated the letters LL in your mind? Ans. With Badger State LL, and Beaver Dam LL, Lawrence LL (See Q 1340), which I consider about equal in value.

Q. 1327. This LL on the Lawrence sheeting always indicated the quality or grade of the sheeting, did it not? Ans. Yes, sir. (See testimony in full.)

Geo. H. Gillett:

Q. 1463. Does not LL stamped on such goods convey to your mind the signification that they designate the grade of the goods as distinguished from other grades of fine sheeting? Ans. Yes.

Q. 1464 And the words Lawrence Mills convey to you the name of the manufacturer? Ans. Yes.

Fred W. Meyer:

Q. 1474. The LL indicates the grade of the goods, does it not? Ans. That is what I understand.

Q. 1475. And the words Lawrence Mills, Beaver Dam and Aurora, indicate the names of the general mills making them? Ans. Yes, sir.

Q. 1487. What does LL when applied to sheetings mean to you and to the trade with which you are familiar? Ans. A four yard—a cotton cloth weighing four yards to the pound and measuring fifty-six by sixty threads to the square inch.

The testimony of the remainder of the complainant's witnesses upon this point is simply a repetition of what the foregoing have testified to.

See questions 1507, 1518, 1547, 1573, 1679, 1702, 2186, 2358.

The witnesses for the defendants also testify that the letters LL, on sheetings, do not indicate the name of the manufacturer but simply the weight, grade or quality of the goods.

Henry A. Coburn:

B. D., Q. 131. State whether or not any letters stamped on brown sheetings unaccompanied by the name of the mill is understood in the trade to indicate the name of the mill that makes the goods? Ans. Not at all.

John Buchanan:

B. D. Q. 663. State the accepted meaning in the trade of the letters LL. when stamped upon sheeting. Ans. It simply means a four yard sheeting in weight and ought to count 56 56.

E. B. Morgan:

B. D. Q. 484. Please state for what purpose the letters LL. are used on the Crescent City and Hoosier State brands? Ans. To designate the character of the goods and weight of the goods.

See to the same effect, B. D. testimony, questions, 82, 391, 421, 821, 556, 585, 614, 759, 824, 1000, 2, 15; A. C. M. testimony, questions 84, 150, 298, 327, 343, 448.

Ray's testimony, question 134, page 37: What did LL. stamped upon your sheeting designate? Ans. It designated the weight of the goods.

Bailey, page 61: Q. What did the letters LL. stamped upon the sheeting manufactured by the Janesville Cotton Mills Company indicate or mean? Ans. The weight and the count of the goods 56-square four yards goods,

The names of the brands were always associated with the LL. in ordering—the names to indicate the manufacturer and the LL. to indicate the grade. This is shown by complainant's testimony.

C. C. Cook:

Q. 1183. Were not the Lawrence LL., the Baltic LL. and the Badger LL known in the trade and to buyers, so far as you know, by the names Lawrence LL., Baltic LL. and Badger State LL.? Ans. Yes, they were.

Q. 1184. It is well known to your trade, so far as you know, to know that they were manufactured by different makers than the Lawrence LL. and were not the identical goods with the Lawrence LL., *i. e.*, of the same make? Ans. Yes, sir.

See to same effect, questions 1240, 1654, 1329, 1442, 1536½, 1576–7, 2154, 2269.

H. L. Pinney, general salesman for Marshal Field & Co., the largest jobbing house in the United States, says (Q. 1771): "I don't suppose there is one customer in five hundred ordering LL. sheetings that do not designate which brand they want."

The testimony of the jobbers generally is that it is a very rare occurrence that orders come in for LL. goods that do not state the make of the goods; that sometimes where they carry only one make of LL.'s, or the customer has been in the habit of purchasing only a single brand, the order will come in for LL. goods. That in such cases if they carry only one line of LL.'s they fill the order with that; if more, they refer to the customer's previous purchases for an interpretation of the order.

All of the defendant's witnesses testify that the letters LL. always indicate quality, weight or grade; that they never indicate ownership, and that in ordering the goods and distinguishing them the other words of the stamp or label or some of them are always used.

See A. C. M. testimony, questions 342, 513, 514, 546, 567 to 570, 646, 596, 326, 327, 298, 299, 161, 162, 77.

See B. D. testimony, questions 82, 120, 134, 328, 362, 391, 392, 421, 493, 494, 556, 584, 585, 614, 657, 664, 716, 759, 824, 864, 948, 1001, 1054, 1087.

The Lawrence Manufacturing Company makes three grades of brown sheetings: one, marked XX, weighing three and twenty-hundreths yards to pound, XXX, weighing two and eighty-five-hundreths yards to pound, and LL., weighing four yards to pound. (See questions 77 to 99, complainant's testimony.)

The Shawmut LL. comprise seconds or defective goods which otherwise would have been branded Lawrence LL.

The fact that in these Shawmut goods the Lawrence company concealed their "Lawrence Mills'" brand, but used the LL., causes the irresistible conviction that the Lawrence Company never looked upon the letters "LL" as in any manner indicative of the manufacturer: but that they put them on both brands to designate the weight and style of the goods.

Their own testimony shows that the purpose of putting on Shawmut instead of Lawrence was to conceal the manufacturer, to the end that the reputation of the Lawrence goods should not be injured by putting these defective pieces on the market.

Second—The Janesville Manufacturing Company began stamping their four-yard sheetings with "LL." more than ten years before any objection was made to their doing so by the complainant or anybody else, and continued to do so without molestation up to February, 1886, as shown by the testimony of Chester N. Bailey, taken on the part of defendant, and by that of A. J. Ray, taken on behalf of complainant.

Other mills have been using the LL. for a long term, and the testimony discloses the fact that the brands of LL. sheetings have been almost innumerable during the last few years.

These various brands were well known to the trade—the Badger State LL. especially so, and is mentioned as an old and familiar brand by a very large number of witnesses.

Third—It is shown by the testimony of John Kilburn, superintendent of complainant's mills, that the Shawmut LL., the seconds of the Lawrence LL., has been in the market ever since his connection with the mill, about eight years. (Compts. test., Q. 30 to 100.)

Almost every witness in the case shows a familiarity with this brand of sheeting, and it is shown to have been in the market nearly or quite as long as Lawrence LL.

The Lawrence Co. have stamped the same grade of sheeting as their Lawrence LL. with the brand Albany LL., for J. V. Farwell & Co., this being Farwell & Co.'s private brand.

This is shown by testimony of Hestius S. Smith, who is in the employ of Farwell & Co.

A. C. M. Q. 577. Has the Lawrence Manufacturing Company ever furnished the firm of J. V. Farwell & Co., Albany LL.'s, and if so, to what extent? Ans. They have branded these same goods in weight and texture claiming, that they were the Lawrence LL., in fact Albany LL.'s. I can't state to what extent, but they done so.

This is also shown by the testimony of Lucius M. Sargent, treasurer of the Lawrence Manufacturing Company.

B. D. Q. 458. Please state whether or not the Lawrence Manufacturing Company in August, 1884, or any part of the year 1884, made for John V. Farwell & Co., of Chicago, one hundred and fifty bales of brown cotton sheeting and stamped it Albany LL.? Ans. We did in October, 1884.

B. D. Q. 467. Am I right in saying that Albany LL. was placed as you have testified at the request of John V. Farwell & Co., and that the goods so stamped were regular LL. goods? Ans. You are so far as I know.

Fourth—Brown cotton sheetings weighing not far from four yards to the pound, were stamped with the letters LL as early as 1860, by the Atlantic Company. They have continued the use of LL. on their sheetings up to the present time, gradually decreasing the weight of the goods, till now they weigh only about five yards to the pound, but are so near the weight of the Lawrence LL. goods that they are brought in competition with them.

See as to manufacture of Atlantic LL. previous to 1867, the testimony of Jonathan C. Browker, book-keeper of the Atlantic Cotton Mills.—B. D. Q. 4 to 10, 36 to 38.

Also testimony of Edward Defresue.—B. D. Q., 47 to 49.

Also testimony of Lowell Carver.—B. D. Q., 68.

Nearly all the witnesses have handled the Atlantic LL. and many of the witnesses testify that they come in competition with the other brands of LL. sheetings.

L. K. Scott:

A. C. M. Q. 83. What is the fact as to whether or not the Atlantic LL.'s come in competition in the trade with the LL.'s of the other manufactories named by you; state fully? Ans. Yes, sir, it does; in fact we have been getting a little more for that grade of sheeting than for the others.

Earnest L. Hobbs:

A. C. M. Q. 199. Do you understand that the Atlantic LL. is a four yard goods? Ans. It is.

A. C. M. Q. 200. Is it so known to the trade? Ans. It is really in the trade a lighter goods, but is sold as a four yard goods to a great extent.

See A. C. M. Q. 398 to 410.

See B. D. Q. 633 to 637.

It is very difficult for an ordinary person to distinguish between the Atlantic LL. and the Lawrence LL. sheetings without seeing the brands.

This was shown during the examination of Adolph Lurie, one of the complainant's witnesses and a merchant of long standing in Chicago, and one who showed himself to be familiar with cotton sheetings.

Defendant's counsel covered the words of the brand leaving the LL's exposed on the Lawrence sheetings and Atlantic sheetings, and the witness standing only four feet from the goods mistook Lawrence sheetings for Atlantic and Atlantic for Lawrence.

(Complainant's testimony, questions 1977 to 1994.)

Fifth.—From an examination of the stamp or brand on complainant's sheetings, and the stamp or brand on defendant's sheetings, it is evident that a person of ordinary care in purchasing sheetings could not be deceived.

LAW.

I.

A sign, symbol, letter, figure, word or device which is simply descriptive of the grade, quality, weight or style of the goods so marked will not be protected as a trade-mark.

The leading case in the United States on this subject is that of Amoskeag Manufacturing Company vs. Spear, 2 Sandf., 599, and the doctrine there laid down has been generally adopted as law in this country.

The plaintiff in that case used the following stamp or label on its tickings:

AMOSKEAG MANUFACTURING COMPANY.

POWER LOOM.

Yds. ——.

A. C. A.

AMOSKEAG FALLS, N. H.

The defendant used the following stamp:

LOWELL PREMIUM TICKING.

POWER LOOM.

Yds. ——.

A. C. A.

WARRANTED INDIGO BLUE.

The plaintiff brought suit to restrain the defendants from using the letters A. C. A.

The court, Duer, J., held that the letters A. C. A. simply indicated the quality of the goods and could not be upheld as a trade-mark.

Much stronger grounds were shown in that case for the relief sought, than in the case at bar, the complaint averring and several witnesses swearing that the "A. C." signified the Amoskeag Company, and "A." best quality.

The court held however, that the words "Amoskeag Manufacturing Company" printed in the label sufficiently indicated the origin of the goods, and that the "A. C. A." must be held to indicate the quality or grade of the goods of that mark.

(See the opinion in full.)

Mr. Upton in his work on Trade Marks, on page 85, says:

The general principles resulting from almost all the cases in which the question of the requisite characteristics of a trade-mark has been considered, are perhaps nowhere more clearly or fully stated than by the learned judge in the leading American case of the Amoskeag Manufacturing Company vs. Spear, 2 Sandf. S. C. R., 599.

The same author, after considering exhaustively this and other cases on the subject, deduces the following rule, page 137:

Fourth.— *That although, by long continued use of certain words, letters, marks, or symbols which do not of themselves and were not designed to indicate the origin or ownership of the goods to which they are affixed, the goods so marked and because so marked have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols or the intent with which they were first used as denoting the name of the thing or its general or relative quality or take from others the right to employ them in the same sense.*

Mr. Browne, in his work on trade-marks, speaking of the opinion in Amoskeag Co. vs. Spear, says:

"The judge had a clear conception of all the principles involved, and his decision was unquestionably correct."

Strong J., in Canal Co. vs. Clark, 13 Wall., 323, says:

"As was said in the well considered case of the Amoskeag Manufacturing Company vs. Spear, the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all marks, forms, symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; *but he has no right to the exclusive right to the use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality.*"

The most important case on this subject, and the one that must be held decisive of the point at issue, is that of Manufacturing Company vs. Trainer, 101 U. S., 51.

The plaintiff, we understand, was the same as in the case of Amoskeag Co. vs. Spear, 2 Sandf., 599.

Mr. Justice Field, in his opinion on page 55, said:

"If, now, we apply the views thus expressed to the case at bar, we shall find the question involved to be easy of solution. It is clear from the history of the adoption of the letters A. C. A., as narrated by the complainant and the device within which they are used, that they were only designed to represent *the highest quality of ticking which is manufactured by the complainant and not in its origin.*

"The device previously and subsequently used stated the name of the manufacturer, and no purpose could have been subserved by any further declaration of that fact. And, besides, the letters themselves do not suggest anything, and require explanation before any meaning can be attached to them. That explanation, when made, is that they are placed in the device of the company when it is affixed to the finest quality of its goods, while single letters are used in the same device when it is attached to goods of an inferior quality. They are never used by themselves, but merely as a part of a device, containing in addition to the border in red, several printed terms. Alone the letters convey no meaning; they are only significant as part of the general device, constituting the trade mark. *Used in that device to denote only quality—and so understood, they can be used by others equally with the words 'superior' or 'superfine'* or other words or letters or figures having a like signification.

"We are aware that there is in the record the testimony of several witnesses to the effect that they understood that the letters were intended to indicate the origin as well as the quality of the goods to which they were attached, *but it is entirely overborne by the patent fact that the label previously disclosed the name in full of the manufacturer,* and by the history of the adoption of the letters as narrated by the complainant. As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company.

"*If an explanation be asked of their purpose in the label, the only reasonable answer that can be given is the one which cor-*

responds with the fact, that they are desined merely to indicateg the quality of the goods."

The followning cases are in point, and most if not all of them cite with approval the case of Amoskeag Co. vs. Spear, *supra:*

Filley vs. Fassett, 44 Mo., 176.
Stokes vs. Landgraff, 17 Barb., 608.
Falkenburg vs. Lucy, 35 Cal., 64.
Candee vs. Deere, 54 Ill., 439.
Boardman vs. Meridan Brit. Co., 35 Conn., 414.
Burton vs. Stratton, 12 Fed. Rep., 696.
Furguson vs. Davol Mills, 2 Brews. (Pa.), 3[illegible].
Avery vs. Meikle, 81 Ky., 73–102.
Marshall vs. Pinkham, 52 Wis., 572, 77–78.
Ball vs. Siegel, 116 Ill., 137–143.
Gilman vs. Hunnewell, 122 Mass., 139.
O' Rourke vs. Central City Soap Co., 26 Fed. Rep., 576–7.
Caswell vs. Davies, 58 N. Y., 223.
Taylor vs. Gillies, 59 N. Y., 331.

II.

By its long acquiescence in the use of the letters LL by the Janesville Manufacturing Company and by other companies, the complainant has lost its right to the exclusive use of said letters as a trade-mark, if it ever had any such right.

As is shown above, the Janesville Manufacturing Company used the LL for a period of more than ten years prior to the commencement of this suit, had used LL on its sheeting, and other mills have used it for longer or shorter periods of time. The evidence discloses the fact that for quite a number of years past a large number of mills have been making four yard sheetings and marking them LL; that the four yard sheeting is a popular grade of sheeting; and that these various companies have been establishing markets for this grade of sheetings in many localities where the Lawrence sheetings were never known.

The LL brand of sheeting is popular with the people, not because the LL represents or indicates in any manner the company or mill that manufactures it, but because it is of the grade and quality which suits the people's needs.

A large class of the trade demands a sheeting of about this weight; the letters LL seem to have been generally adopted to indicate this weight, and sheetings branded LL naturally sell more quickly and easily to this class of trade than other and unknown brands.

The complainant in fact has been benefited instead of injured by this increase of trade in LL goods. Its production of them has steadily grown from two hundred thousand yards in 1867 to nearly fourteen millions of yards in 1885, and the increase during the years 1884 and 1885 was more than two million yards each year over the production of the previous year (compts. testimony, page 27).

The complainant has lain by and allowed these western and southern companies to build up an immense trade in these LL

goods, and to greatly extend their reputation, and the demand for them.

It would be a most inequitable proceeding to now restrain these companies from the use of these letters and allow the complainant to come in and take unto itself the entire benefit of this increased demand.

A court of equity will not lend its aid to such an enterprise.

It will neither restrain the use of this pretended trade-mark nor allow the complainant damages for any infringement.

Browne on Trade-Marks, § 497.
Amoskeag Manuf. Co. vs. Garner, 55 Barb., 151–65.
Lewis vs. Chapman, 3 Beav., 133.
Beard vs. Turner, 13 L. T. R. (N. S.), 747; Cox, 717.
In re Farina, 27 Weekly Rep., 426–7.
Weldon vs. Wicks, 10 Ch. Div., 247–262.
Sheldon vs. Rockwell, 9 Wis., 158.
Estes vs. Worthington, 22 Fed. Rep., 822.
McLean vs. Fleming, 96 U. S., 245–257.
Upton on Trade-Marks, page 139.
Flavel vs. Harrison, 19 Eng. L. & Eq., 15.

III.

The claim is made by the complainant that the use of the letters LL. by the defendant's mills has a tendency to deceive and defraud the public and they ask relief on that ground.

It is proved however, beyond controversy, that the complainant has aided in deceiving and defrauding the public if any fraud or deceit there has been.

It has not only branded sheetings of the same grade and value as Lawrence LL. with the private brands of certain jobbers, but it has during the whole time that it has manufactured the Lawrence LL. put upon the market an inferior quality of goods marked with the LL.

The Shawmut LL. is of the same general weight and grade as the Lawrence LL. and comes into competition with it.

If buyers of cotton sheetings are ever deceived by the presence in the market of brands of LL. goods other than the Lawrence, then this complainant is an active participant in such deceit and has no standing in a court of equity.

Manhattan Medicine Co. vs. Wood, 108 U. S., 218.

In that case it was shown that the plaintiff company was manufacturing medicine in New York and representing it as manufactured and sold by Moses Atwood, of Georgetown, Mass. On this ground the court refused to restrain the defendant from using plaintiff's trade-mark.

Justice Field, quoting from the opinion of Justice Duer, in Fetridge vs. Wells, 4 Abb. N. Y., 144 states.

"Those who come into a court of equity seeking equity, must come with clean hands and a pure conscience. If they claim relief against the frauds of others they must themselves be free from the imputation. If the sales made by the plaintiff and his

firm are affected or sought to be by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

If the LL. on the Lawrence goods indicated in any manner the origin or manufacture of the goods, and goods so stamped met public favor because of being so stamped, then the public were deceived into buying the defective Shawmut goods because of the stamp LL. Equity will not grant relief to a plaintiff who has made false representations regarding his goods.

Hobbs vs. Francais, 19 How. (N. Y.), 567.
Palmer vs. Harris, 60 Penn. St., 156.
Connell vs. Reed, 128 Mass., 477.
Fetridge vs. Wells, 4 Abb. (N. Y.), 144.
Perry vs. Truefitt, 6 Beav., 66.
Pidding vs. How, 8 Simons, 477.
Curtis vs. Bryan, 33 How. Pr., 33.
Browne on Trade Marks, §351.
Seabury vs. Grosvenor, 14 Blatch., 262.

IV.

"Property in trade marks, by which is always intended the right to protection in their exclusive use, is primarily acquired by original adoption, appropriation and actual use by the manufacturer or other person possesssed of an exclusive right in the thing designated."

Upton on Trade Marks, page 46.
Fetridge vs. Merchant, 4 Abb. Pr., 156.
Amoskeag Co. vs. Spear, 2 Sandf. Ch., 599.

It is proved beyond controversy that the Atlantic Cotton Co. commenced using the letters LL. on sheetings of substantially the same grade as early as 1860, and have used them ever since. If there is any property in the letters as a trade mark it is undoubtedly in the Atlantic Co., and the Lawrence Co. are simply pirates of the Atlantic Co.'s mark.

Under such circumstances equity can grant the Lawrence Co. no relief.

V.

To constitute an infringement of a trade-mark the imitation must be such as is calculated to mislead and deceive persons using such care and paying such attention as persons of ordinary intelligence usually exercise.

Upton on Trade Marks, 215.
Merrimack Manuf. Co. vs. Garner, 490 Smith, 3829.
Partridge vs. Menck, 2 Sandf. Ch., 622.
Colladay vs. Baird, 4 Phil., 139.
Popham vs. Cole, 66 N. Y., 69.

The stamps or labels of the parties must be considered as a whole. So considered there is not even a suggestion of similarity between them.

Considering the letters alone aside from the rest of the brand it is hard to imagine how anybody would be led to infer that they were the same brand of goods. It would be impossible to deceive even the most careless purchaser. The two combinations suggest not similarity in the goods but rather dissimilarity.

VI.

This case differs from that of the Lawrence Manufacturing Company vs. the Tennessee Manufacturing Company only in the claim that "the Janesville Cotton Mills" is bound by the decree entered by consent in the case of the same plaintiff against "the Janesville Cotton Manufacturing Company" restraining the latter company from using the letters LL. as a brand on its sheeting.

The claim is based upon the following facts:

The Janesville Cotton Manufacturing Company was incorporated in the State of Wisconsin some time previous to 1875, with a capital stock of $300,000, and was engaged in the manufacture of cotton cloth. In the fall of 1875, it commenced to brand its four yard sheeting BADGER STATE in half circle with the word SHEETING underneath, and within the half circle, the monogram

and under the words sheeting, the letters LL., as shown on the diagram between pages 78 and 79 of the printed case, except that the letters LL. are not shown on that diagram. Ray's testimony, page 36, fol 472.

They continued the use of that brand for ten years without objection by any one. Objection was not made to its use until February, 1886, page 38, fol. 475, and immediately thereafter the complainant commenced suit against the Janesville Cotton Manufacturing company to restrain them from using the letters LL on its sheeting. The latter company at that time, and for a considerable time before, was suffering from pecuniary embarrassment and determined to give up the business of manufacturing cotton sheeting, to sell all its property and to surrender its charter, page 46, fol. 485. A resolution to that effect was adopted by the board of directors on the 10th of March and ratified at a stockholders' meeting on the 11th of March, 1886, page 46, fol. 486.

The defendant, the Janesville Cotton Mills, an entirely new and distinct corporation, was organized under the laws of Wisconsin by articles of association filed with the secretary of state on the 21st day of April, 1886, with a capital of $150,000, and it contemplated acquiring title to the property of the Janesville Cotton Manufacturing company, subject to all existing liens thereon, and in case it should purchase such property, it was "to assume and pay all indebtedness of said Janesville Cotton Manufacturing company due or to become due *upon its promissory notes or other written contracts* which are not secured by liens upon its property, but not to assume any indebtedness *or liability* secured by lien upon such property or *evidenced otherwise than as above stated.*" Said articles of association also provided that "subscriptions to the capital stock of said Janesville Cotton Mills may be paid in by or with notes or bonds executed by said Janesville Cotton Manufacturing company due or to become due if the payment thereof is either assumed by or secured by lien upon the property of said Janesville Cotton Mills."

It will thus be seen that the incorporation of the Janesville Cotton Mills was wholly separate from, and independent of, the Janesville Cotton Manufacturing company. The only connection between the two was that the new corporation bought the property of the old subject to the liens upon it, and as a consideration for the property agreed to pay all debts due upon the promissory notes and other written promise of the old company, and that some of the stockholders of the old company became stockholders in the new company.

The old company being about to dissolve and cease business it accepted the proposal of the solicitors for the complainant, made the latter part of March, 1886, that it would make no claim for damages and would permit the Janesville Cotton Manufacturing Company to continue the use of the letters LL. until the first of July then following and would not tax any costs against the defendant if it would stipulate to allow a decree to pass against it perpetually restraining it from using said letters LL. on its manufactured goods after the 1st of July, 8186, and its solicitor, Mr. Sutherland, accordingly was authorized to sign such a stipulation on April 3, 1886. Page 27, fol. 458. The decree entered in pursuance of such stipulation was given in evidence in the case against the Tennessee Manufacturing Company and is found in the printed record in that cause at page 198, fol. 312.

The Janesville Manufacturing Company had ceased to exist long before July 1, 1886. By a deed dated April 21, 1886, it had conveyed all its real property, including its cotton mills, to the defendant in this case. Page 47, fol. 487, of printed record in this case.

The only attempt to connect the Janesville Cotton Mills with the stipulation of the old company and the decree entered thereon will be found in the extraordinary and unenviable testimony of J. H. Raymond, one of the solicitors for the complainant which begins on page 52, fol. 497, of the printed record in

this case. It would be a waste of time to show that this attempt was a disastrous failure.

The law is well settled that if a new and independent corporation is formed to succeed an old one and to acquire its property and carry on the same business, it is not bound by the obligations nor subject to the liabilities of the old one, except so far as they are expressly assumed.

In Bellows vs. Hollowell, Bank 2, Mason 43–44, Justice Story states the rule as follows:

"To ascertain whether a charter creates a new corporation or merely continues the existence of the old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the corporation."

Mr. Morawetz in his work on corporation, sec. 812, states the rule as follows:

"If the object of the transaction is to form a new corporation with a new capital, no intention to continue the obligations of the old company as against the new company can be implied, although the shareholders and officers of both companies may be the same." Citing many cases.

I cite the following from among the numerous authorities that abundantly establish this rule:

Penn. Transportation Co., appeal, 101 Pa. St., 576.
Wyman vs. Hallowell Bank, 14 Mass., 58.
Bruffit vs. Great Western Ry., 25 Ill., 353.
State vs. Bailey, 16 Ind., 46.
Huff vs. Winona, 11 Minn., 180 op., 192.
Clearwater vs. Meredith, 1 Wal. 25, op. 39.
Shields vs. Ohio, 95 U. S., 319.
Railroad Co. vs Maine, 96 U. S., 499.
Railroad Co. vs. Georgia, 98 U. S., 359.

I. C. SLOAN,
Solicitor for Defendant.

I. C. SLOAN,
Of Counsel.

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Supreme Court of the United States

LAWRENCE MANUFACTURING COMPANY,

Appellant,

vs.

JANESVILLE COTTON MILLS,

Appellee.

BRIEF FOR APPELLEE.

J. C. SLOAN,
Of Counsel for Appellee.

Supreme Court of the United States.

LAWRENCE MANUFACTURING COMPANY,
APPELLANT,

vs.

JANESVILLE COTTON MILLS,
APPELLEE.

On examining the brief of appellant in this cause I find that the whole reliance is placed upon the proceedings against the Janesville Cotton Manufacturing Company and the decree entered in that case, together with the testimony of J. H. Raymond, in which he attempts to establish an oral agreement which it is claimed will bind the appellee in this case. As the testimony on this subject is scattered through the printed record I have deemed it best to collect and place it before the Court in chronological order.

The suit against the Janesville Cotton Manufacturing Company was commenced in February, 1886. The first interview or correspondence between any of the officers or agents of the old company and the complainants' solicitors occurred on March 30, 1886, when George G. Sutherland, the solicitor for the old company, called on Messrs. Raymond & Rainey at their office in Chicago.

At that interview Mr. Sutherland produced a stipulation written by himself, which was not satisfactory to Mr. Raymond, who then had written the following stipulation (page 5):

Stipulation.

"It is hereby stipulated and agreed by and between the parties to the above-entitled suit—

"That the said Lawrence Manufacturing Company hereby consents that the suit commenced in the Circuit Court of the United States for the western district of Wisconsin against said Janesville Cotton Manufacturing Company be dismissed without costs to said Janesville Cotton Manufacturing Company, and also hereby waives all claims to damages against the said Janesville Cotton Manufacturing Company; and the said Janesville Cotton Manufacturing Company hereby agrees not to use the label or trade-mark 'L L' on any goods of its manufacture after the first day of July, A. D. 1886; and it is further stipulated that a consent decree discontinuing said suit without the right of appeal shall be entered in accordance with the terms thereof.

"March 30, 1886."

"(Signed) RAYMOND & RAINEY,
"*Solicitors for Complainant.*
"GEO. G. SUTHERLAND,
"*Solicitor for Defendant.*

That said stipulation (and, as is claimed, a copy of an agreement to be executed by the old company), together with the following letter (page 48) were delivered to Mr. Sutherland:

"*March* 30, 1886.

"Mr. GEORGE G. SUTHERLAND,
"*Attorney for the Janesville Cotton Manufacturing Company, present:*

"MY DEAR SIR: I hand you herewith three copies of the stipulation signed by us for the discontinuance of the suit of the Lawrence Manufacturing Company *v.* The Janesville Cotton Manufacturing Company, together with three copies of an agreement to be executed under the authority of the board of directors by the president and secretary, and under the seal of the latter company. I have no doubt that the Lawrence Company will authorize this settlement of the matter. Of this, however, we will inform you later, and if so authorized we would be

glad if you would have the agreement herewith duly executed and return to us the original and one of the copies. Please also return to us the original copy of the stipulation, with one copy thereof for our own use.

"If your company desires it we will obtain from Boston and send to you a formal release by the Lawrence Company, duly executed, of all claims for damages, etc., but the agreement of the Janesville Company, made in consideration of that release, and the whole matter being of record in court, would not necessitate such a formal release from the Lawrence Company. It will, however, be furnished if desired.

"Yours truly,

"J. H. RAYMOND,
For Raymond & Rainey."

"Dictated letter."

On April 3, 1866, the following proceedings were had by said old company (page 27):

"Matters pertaining to the suit brought against our company by the Lawrence Manufacturing Company for infringement of their right in the use of the stamp L L on our sheetings were explained by Mr. Sutherland, and, on motion of Mr. Eldred, Mr. Sutherland was authorized and instructed, as our attorney, to sign the stipulations agreed upon by the attorneys of the Lawrence Manufacturing Company and Mr. Sutherland in behalf of the Janesville Cotton Manufacturing Company.

"On motion, Mr. Sutherland was instructed to notify the attorneys of the Lawrence Manufacturing Company that the president and secretary of the Janesville Cotton Manufacturing Company will execute, under the authority of its board of directors, the agreement to discontinue the use of said L L stamp whenever the Lawrence Manufacturing Company shall sign a formal release, duly executed, of all claims for damages, etc., against the Janesville Cotton Manufacturing Company for the use of said L L stamp.

"The business of the meeting being completed, the meeting, on motion, adjourned *sine die.*

"A. J. RAY, *Secretary.*"

And Mr. Sutherland wrote to Raymond & Rainey the following letter (page 16):

"OFFICE OF THE
"JANESVILLE COTTON MANUFACTURING COMPANY,
"JANESVILLE, WIS., *April* 3, 1886.

"Mess. RAYMOND & RAINEY, Chicago.

"DEAR SIRS: I was unable to get a meeting of the directors of the Janesville Cotton M'f'g Co. until this afternoon.

"They have just authorized me to sign the stipulations as drawn, and they further authorized the president and secretary to sign the agreement drawn by you on receiving the release mentioned in your letter from the Lawrence M'f'g Co.

"I have sent the original stipulation to the clerk of the court at Madison, and enclose you a duplicate.

"Yours, &c.,
"GEO. G. SUTHERLAND."

Said stipulation was filed and the following decree (pages 5 and 6) entered thereon:

Decree.

"This cause coming on to be heard, Messrs. Raymond & Rainey appearing for the complainant, and Mr. Geo. G. Sutherland appearing for the defendant, and confessing the said bill of complaint and consenting to this final finding and decree, the Court doth order, adjudge, and decree as follows, the same being in accordance with the stipulation of the parties heretofore herein filed, to wit:

"First. That the taxable costs heretofore and now incurred herein shall be paid by the complainant.

"Second. That a perpetual injunction issue out of and under the seal of this Court against the said defendant, The Janesville Cotton Manufacturing Company, commanding it and each and every its officers, agents, servants, and employés that from and after the first day of July, A. D. 1886, they and each of them shall desist and refrain from, directly or indirectly, using the said letters 'L L' upon any sheetings of their manufacture as in said bill of complaint is mentioned.

"We hereby assent to the above form of decree, the same being in accordance with the terms of a stipulation of the parties hereto, heretofore filed herein.

"(Signed) RAYMOND & RAINEY
"*For Complainant.*

"(Signed) GEO. G. SUTHERLAND,
"*For Defendant.*

Nothing further was done until the new company, the present appellee, issued the following circular—date does not appear—page 8:

Dissolution and Reorganization.

"Dr. Henry Palmer, president; A. J. Ray, secretary; F. S. Eldred, treasurer.

"OFFICE OF THE JANESVILLE COTTON MILLS,
"JANESVILLE, WIS., ——, 1886.

"M. ————:

"The corporation known as the Janesville Cotton Manufacturing Company has been dissolved by mutual consent of the stockholders, and all of its property, consisting of two thoroughly equipped cotton mills, together with its franchises and good-will, has been sold and transferred to the Janesville Cotton Mills, a new corporation organized for the purpose of continuing the manufacture and sale of the justly celebrated 'Badger State sheetings.'

"The new corporation purpose to make the three grades of sheeting known to the trade as Badger State, R, R R, and L L, under a distinct trade-mark and stamp of their own, consisting of a diagonal bar across the letters R & L, with or without the word 'double,' to wit: Badger State, R, Dou R ble, Dou L ble.

"It will be their aim to maintain a standard of quality equal to the best in the market, and with improved financial ability and increased facilities for making goods they hope to be able to meet promptly the requirements of the trade and secure a place for Badger sheetings in the stock of every jobbing house in the Northwest.

"Mr. C. S. Longenecker, of Chicago, has been appointed selling agent, to whom orders are to be addressed, or they

may be sent direct to the mills, which, in either case, will receive prompt and careful attention.

"JANESVILLE COTTON MILLS."

On May 1, 1886, Raymond & Rainey wrote the following letter to Sutherland (page 14):

"CHICAGO, ILLINOIS, *May* 1, 1886.

"Mr. GEO. G. SUTHERLAND, Janesville, Wis.

"DEAR SIR: We learn that the Janesville Cotton Mills propose, after the 1st of July, to stamp its 4-y'd sheetings with the following: 'Double.'

"We submit that if this information is correct it will be in violation of the spirit, if not the letter, of the stipulation and decree in the Lawrence M'f'g Co. *v.* Janesville Cotton M'f'g Co.

"We hope our information is incorrect, and if correct, you will advise your clients to avoid such an evasion of the stipulation and decree.

"We would not want to institute another suit to prevent this, but feel confident our client would instruct us to do so at once.

"Please let us hear from you, obliging—

"Very truly yours,

"RAYMOND & RAINEY."

The only other letter which passed between the parties is found on page 16:

"LAW OFFICE OF GEO. G. SUTHERLAND,
JANESVILLE, WIS., *May* 22, 1886.

"Mess. RAYMOND & RAINEY, Chicago.

"DEAR SIRS: Yours of the 19th at hand. I have consulted with the president & treasurer about the matters referred to in your letter, and they have directed me to do nothing about the matter until after July 1st.

"Yours truly,

"GEO. G. SUTHERLAND."

The foregoing comprises all the correspondence that passed between the parties, and the only interview bearing on the subject was the one on March 30, 1886, between

Sutherland & Raymond, at the latter's office; the only testimony in relation to that interview was given by Mason, a clerk in Raymond's office, page 47 *et seq.*, and Raymond, page 51 *et seq.*

The following is a copy of the agreement claimed to have been delivered to Sutherland by Raymond on March 30, 1886, page 57:

"For and in consideration of the discontinuance by the Lawrence Manufacturing Company, of Lowell, Massachusetts, of a suit now pending in the United States Circuit Court for the western district of Wisconsin against the Janesville Cotton Mauufacturing Company, and in consideration of a release of all claims for damages for the infringement of the trade-mark of said Lawrence Manufacturing Company for brown sheetings by the use of the letters 'L L,' all in accordance with the stipulation in the case now made and executed, the said Janesville Cotton Manufacturing Company does hereby, for itself, its successors, both in said corporation and in said business, and for its assigns, covenant and agree to and with the said Lawrence Manufacturing Company, its successors and assigns as aforesaid, not to use the label or trade-mark 'L L' on any goods of its manufacture after the first day of July, A. D. 1886.

"In witness whereof the said Janesville Cotton Manufacturing Company has caused these presents to be signed by its president and its corporate seal to be hereto affixed, duly attested by its secretary, this 30th day of March, A. D. 1886.

"JANESVILLE COTTON MANUFACTURING CO.,
"By —— ——, *President.*
"—— ——, *Secretary.*"

But Mr. Sutherland has no recollection of ever seeing this agreement (pages 42 and 43).

The articles of association incorporating the new company are found at page 80, and the proceedings of the old company dissolving and transferring its property are found at pages 46 and 47.

None of the cases cited in appellant's brief bear upon

the question in this case. They are cases where the transfer of the property was merely colorable, or where an agent of the corporation, not made a party to the suit but who had notice of the injunction, violated it.

J. C. SLOAN,
Of Counsel for Appellee.